In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1021

CHARLES TOLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on two counts of concealing and transporting heroin in violation of 21 U.S.C. 174. He was sentenced to ten years' imprisonment on each count to run concurrently. The court of appeals affirmed (Pet. App. 28-31). Petitioner challenges here, as he did below, the validity of the seizure of heroin without a warrant from his co-defendant's automo-

bile, and the validity of a search warrant obtained prior to a search of his own automobile.

The evidence, which is not in dispute, is fully set forth in the opinion of the court below. It showed that a federal narcotics agent received information from an unidentified caller that certain persons were about to meet at a designated location to transfer narcotics. The informer gave names, physical descriptions, and a description of the cars to be driven. The voice of the informer was recognized by another agent as belonging to a person who had provided reliable information in the past. Upon the agents' arrival at the specified location they observed petitioner, who was known by the agents to be a drug offender, drive up in a red sports car as previously described by the informer and then get into an Oldsmobile, also previously described, with his codefendant, Maxfill. Petitioner and Maxfill then proceeded to another location where petitioner alighted from the Oldsmobile and went to a parked yellow Thunderbird. He retrieved a brown paper bag from the trunk and returned with the bag to the Oldsmobile. After dropping off petitioner at the original meeting place, Maxfill drove to a toll bridge and stopped behind one of the surveillance cars. The other surveillance car pulled in behind the Oldsmobile. The agent in the front car then approached the driver's side of the Oldsmobile. The agent identified himself as a narcotics agent and asked for Maxfill's identification. Maxfill got out of his car and, as he did, the agent noticed in plain view on the transmission hump a brown paper bag with a

knotted rubber contraceptive protruding from it. The bag apparently contained white powder, which was later determined to be heroin. Maxfill was then arrested and the bag seized. On the basis of the observed events, the discovery of the heroin, and the informer's tip (see Affidavit, Pet. App. 36-41), a search warrant was obtained for petitioner's Thunderbird, from which the narcotics had been originally obtained. The subsequent search of the Thunderbird revealed additional amounts of heroin.

The court of appeals properly rejected petitioner's claim that the heroin seized from his codefendant's Oldsmobile should have been excluded. The court correctly held that petitioner had no standing to challenge that seizure, *Jones* v. *United States*, 362 U.S. 257, and in any event, that it was proper. As the above evidence indicates, the informer's tip and the agent's discovery of the bag, in plain view, which was reasonably believed to contain heroin were more than sufficient to establish probable cause for the arrest and the concurrent seizure. *Draper* v. *United States*, 358 U.S. 307.[1]

Petitioner's contention that the search warrant obtained for the search of the Thunderbird was based

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[1] Although petitioner contends that the observation of the bag which preceded the arrest occurred when the codefendant was blocked-in on the toll bridge, it is clear, as the court of appeals points out (Pet. App. 31. n. 2), that the delay was primarily the result of the normal functioning of the toll line and that a formal arrest of Maxfill was not made until after the heroin was seen by the agent. Since the agent had a right to be in the position he was when he saw the bag, the case is governed by *Rios* v. *United States*, 364 U.S. 253; *Harris* v. *United States*, 390 U.S. 234.

on an insufficient affidavit is also without merit. The affidavit narrated the details of the events that the agents observed, which fully corroborated the informer's tip. It also included a statement that a brown paper bag was taken from the trunk of the Thunderbird by petitioner and carried to the codefendant's automobile where the narcotics were subsequently discovered. The affidavit thus more than met the requirements spelled out in *Spinelli* v. *United States*, 393 U.S. 410.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

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